

Case No.: PD-0034-21

FILED
COURT OF CRIMINAL APPEALS
5/12/2021
DEANA WILLIAMSON, CLERK

In the Texas Court of Criminal Appeals

**CORNELL WITCHER, III,
APPELLANT**

v.

**THE STATE OF TEXAS,
APPELLEE.**

On Discretionary Review from the Sixth Court of Appeals, Cause No. 06-20-00040-CR; Direct Appeal from the trial court in cause number 18F1367-202, 202nd Judicial District Court, Bowie County, Texas, The Honorable John Tidwell, presiding.

**Appellant's Motion to Extend Time to File
Brief**

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Cornell Witcher, III, who files this Motion for Continuance to file Appellant's Brief.

Appellant's Brief is due May 7, 2021. Appellant asks this Court to grant his attorney thirty additional days in which to file the brief, making the brief due June 7, 2021. Appellant has not sought nor received a prior extension for this brief.

Appellant's Motion for Continuance

Appellant requests that his attorney receive an additional thirty days in which to file his brief, making it due on June 7, 2021.

Introduction

1. Petitioner on discretionary review is the State of Texas and the Appellant/Respondent is Cornell Witcher, III.

Argument and Authorities

2. Currently, Appellant's brief is due on May 7, 2021.

3. This case has the highest priority from Appellant's counsel. But counsel asks for this extension because counsel has existing deadlines:

- Counsel filed a brief due May 4, 2021 in cause number 05-20-01005-CV in the Fifth Court of Appeals;
- Counsel has a motion for a rehearing and a motion for reconsideration en banc due May 6, 2021 in cause number 05-19-00868-CR in the Fifth Court

of Appeals (oddly this did not have to be completed because the client filed it pro-se);

- Counsel has a brief due May 14, 2021 in cause number 20-10940 in the United States Court of Appeals for the Fifth Circuit; and,
- Counsel has a brief and appendix due May 21, 2021 in cause number 21-1639 in the Eighth Circuit Court of Appeals.

Prayer and Conclusion

4. Appellant requests that this Court grant his counsel an additional thirty days in which to file his brief. This extension will make the brief due on Monday, June 7, 2021. There is no reason to believe that further extensions will be requested.

Respectfully Submitted,

/s/ Niles Illich

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COUNSEL FOR APPELLANT

CERTIFICATE OF CONFERENCE

On May 7, 2021, Niles Illich sent an email to John Messinger concerning this motion, but Mr. Illich has not heard back from Mr. Messinger.

/s/ Niles Illich
Niles Illich

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been delivered to all counsel of record via E-serve on May 7, 2021.

/s/ Niles Illich
Niles Illich

To the Honorable Judges of the Sixth Court of Appeals:

Cornell Witcher, III, Appellant, presents this short Reply Brief.

The question is whether the evidence would have permitted a rational juror to find, beyond a reasonable doubt, that Appellant committed two or more acts over a period of thirty days or more. This is precisely the problem that faced the Court of Criminal Appeals in *Griffith* and exactly the sort of issue anticipated in *Hooper*.

Here the evidence is insufficient because a juror would have had to speculate or guess about when the first offense occurred. The only evidence for when the first assault occurred is that it occurred “when DayDay went to jail.” [19 RR 18; 81; 84; 86]. Instead of providing a specific date (or jail records) the attorney for the State asked the witness, “All right. In about June of—maybe June 10th, give or take, did Dayday get arrested and end up in the Bowie County Jail?” And similarly the investigator testified that DayDay went to jail around June 10th. [19 RR 89].

The record does not establish why the attorney for the State made the decision not to produce the records from the Bowie County Jail. Nor does the record indicate why the attorney for the State did not know the specific date that DayDay went to jail. But this omission required the jury to speculate or surmise that DayDay went to jail between June 10th and June 28.

While this speculation might be reasonable, it is insufficient to support the verdict. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *Griffith v. State*,

No. PD-0639-18, 2019 Tex. Crim. App. Unpub. LEXIS 188, at *1; *13-*15 (Crim. App. Apr. 3, 2019).

This case falls squarely within the admonitions issued by the Court of Criminal Appeals in *Hooper*. Here the evidence allows for reasonable speculation, but the evidence does not support the inference that the first assault occurred on or before June 26, 2018. Thus the evidence does not support the verdict. Appellant asks this Court to vacate the existing judgment and to render a judgment of acquittal or, in the alternative, to reform the judgment to reflect the lesser included offense of first-degree Aggravated Sexual Assault of a Child and to remand this case for a new punishment hearing.

Respectfully Submitted,

/s/ Niles Illich

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.8 of the Texas Rules of Appellate Procedure because it is computer generated and does not exceed 15,000 words. Using the word count feature included with Microsoft Word, the undersigned attorney certifies that this brief contains 641 words. This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
Niles Illich

CERTIFICATE OF SERVICE

This is to certify that on November 20, 2020 that a true and correct copy of this Brief was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows:

Counsel for the State:
Jerry Rochelle at: jrochelle@txkusa.org
Randle Smolarz

/s/ Niles Illich
Niles Illich

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This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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